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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.W., a Person Coming Under the
Juvenile Court Law.

G.W. et al.,

Plaintiffs and Appellants;

v.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Defendant and Respondent.

E044685

(Super.Ct.No. INJ019375)

OPINION

APPEAL from the Superior Court of Riverside County. Kenneth Fernandez,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Plaintiff and
Appellant C.W.

Michael D. Randall, under appointment by the Court of Appeal, for Plaintiff and Appellant G.W.

Joe S. Rank, County Counsel and Anna M. Deckert, Deputy County Counsel, for Defendant and Respondent.

Lori A. Fields, under appointment by the Court of Appeal, for minor.

Appellants G.W. (father) and C.W. (mother) (collectively, “parents”) challenge the juvenile court’s ruling summarily denying their petition to modify a court order, filed under Welfare and Institutions Code section 388.¹ The parents argue² the court abused its discretion when it summarily denied the petition without a hearing because the petition established a prima facie case that new evidence required a modification of the jurisdiction and disposition orders and that the modification would be in the best interest of their daughter, A.W.³ (child). As discussed below, we conclude that the juvenile court did not abuse its discretion when it summarily denied the petition.

STATEMENT OF FACTS AND PROCEDURE

In August 2007, hospital personnel called Riverside County Children’s Services (CPS) to come to the maternity ward to assess the child, who had been born the day

¹ All section references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother and father have filed separate briefs in this matter, but join in each other’s arguments pursuant to California Rules of Court, rule 8.200.

³ Although referred to consistently as A.R. throughout the record, A.W. appears to be the correct name of the child and will be used in this opinion.

before. The child appeared healthy, with apgar scores of 8 and 9, but her mother tested positive for methamphetamines. Hospital personnel told the social worker that the child's urine sample tested negative for methamphetamine. However, they stated that the drug test was performed from the child's second urination, whereas a sample from an infant's first urination is more accurate. A meconium sample had been collected from the child for drug testing, and the results were to be available at a later date.

Mother had told hospital personnel that she did not use drugs, but had taken a diet pill, phentermine, to induce labor because she did not want to miss a job interview in San Francisco. The social worker noted that mother's behavior indicated that she was still under the influence of methamphetamine. Mother was irrational, jittery, agitated, defensive and uncooperative. Hospital personnel reported that they had to strap mother down to deliver the child. Mother told the social worker that she had had only two prenatal visits. Mother denied using drugs at all, and then refused to answer additional questions. Mother had threatened several times to leave the hospital with the child.

The social worker asked father if he used drugs or had seen mother use drugs, and he answered "no" to both questions. The social worker asked to go to the parents' apartment to determine whether they had made any provisions for the child, but father refused. Both parents stated they would not answer any additional questions. Father left while the social worker was conferring with her supervisor, and never returned. The social worker had to request assistance from the local police department before mother would physically relinquish the child so the child could be taken into custody.

The social worker provided mother with notice of the detention hearing and asked her to inform father. The social worker then left the room with the child, escorted by hospital security. When the social worker returned to mother's room to see if father had returned, mother had left the hospital without being discharged. Mother had given birth to the child only the previous day, by caesarian section.

Mother had an extensive history of referrals to child welfare authorities in Ventura County regarding another child beginning in 2001 and ending in 2006. Most of the referrals involved domestic violence between mother and a boyfriend, and included descriptions of erratic behavior by mother. The child was no longer in her custody, and it appears the family court intervened to give the child's father custody.

Juvenile Dependency Petition

The section 300 juvenile dependency petition was filed with the court on August 10, 2007. The petition alleged failure to protect, under section 300, subdivision (b), based upon mother's drug use, admitted lack of prenatal care, threats to leave the hospital, admitted use of phentermine, history of drug use, CPS history with another child, and father's knowledge of mother's drug use and limited prenatal care.

Detention

At the detention hearing held on August 13, 2007, the juvenile court found probable cause to detain the child. The parents were not present for the hearing. Father was present at the courthouse, but chose not to appear in court.

Jurisdiction and Disposition

In the jurisdiction and disposition report filed August 29, 2007, CPS recommended denying reunification services to the parents because their whereabouts were at that time unknown. The social worker had attempted to contact the parents by phone and at their home, to no avail. On August 23, the maternal grandmother called the social worker to report that the parents were no longer living at their residence and that their cellular phones had been disconnected.

At the hearing scheduled for September 4, 2007, neither parent was present. Counsel for each of the parents requested a continuance because they had not yet had contact with their clients. Neither parent was present at the hearing held on September 10, 2007, but both had made contact with counsel. Both parents requested a second continuance so they could be present, because they were currently living in Texas. The juvenile court declined to continue the hearing, stating "It appears to me to that the parents are voluntarily absenting themselves from these hearings. Parents have counsel. So, as far as I'm concerned, they are in the courtroom right now." The court found the allegations in the petition to be true, declared the child a dependent, placed her in the care of CPS, and offered the parents six months of reunification services.

Further Proceedings

A hearing was held on September 24, 2007, because the parents had been located. Both parents were present in court. The parents' respective attorneys told the court that the parents wished to represent themselves, and asked to be relieved. The juvenile court

extensively advised the parents on the perils of self-representation. Eventually the parents agreed to have new counsel appointed for them, and the court did so.

On September 28, 2007, mother filed a “Motion for Reconsideration of Courts Decision on 9/4/07 Regarding Juris and Disposition.” At a hearing held on October 1, 2007, the juvenile court found the motion to be an appropriate one, and set the hearing on it, along with a contested jurisdiction and disposition hearing if necessary, for October 25, 2007. Counsel for father told the court that father was asking to either represent himself or to have other counsel appointed, commenting “I’m not really too sure which.” Counsel for mother stated that mother was also asking to represent herself. The court held a *Marsden*⁴ hearing on that date, but denied the oral motion.

On October 12, 2007, the parents, acting in pro per, jointly filed an “Amendment to Request to Reconsider Court Order.” On October 18, the parents, again acting in pro per, filed the following four documents: 1) “Motion to Challenge Legal Sufficiency of Petition;” 2) “Motion to Suppress Evidence;” 3) “Motion for Discovery of Evidence;” and 4) “Motion to Dismiss Case.”

At the time of the October 25, 2007, hearing on mother’s motion for reconsideration, the proceeding had been ordered transferred from the Indio Superior Court to the Southwest Justice Center.⁵ At the hearing, the juvenile court granted the

⁴ *People v. Marsden* (1970) 2 Cal.3d 118.

⁵ Judge Christopher J. Sheldon conducted the hearings at the Indio Superior Court on September 4, 10 and 24 and October 1, 2007. Commissioner Fernandez conducted the hearings at the Southwest Justice Center.

parents' requests to proceed in pro per. The court asked the parties to address whether it had authority to set aside the jurisdictional findings made by the previous judge, or whether that would be tantamount to sitting as an appellate court. The parents believed the previous judge had vacated the jurisdiction order when it set the October 25 hearing, and that this hearing was to be a contested jurisdiction and disposition hearing. The juvenile court ordered the court reporter from the Indio Superior Court to prepare a transcript of the proceedings before the previous judge to determine what the court had actually decided. The hearing on the motion to reconsider was continued to November 13, 2007.

On October 31, 2007, and again on November 7, the parents filed a "Request to Take Judicial Notice" of a civil action they had filed against CPS and others.

On November 13, 2007, the parents filed: 1) a "Motion to Strike Evidence"; and 2) an "Ex Parte Motion to Change Court Order of Custody."

Addendum Report

CPS filed an addendum report on November 7, 2007. The social worker reported that the previous social worker had received a call from a private adoption agency in Texas on September 4, 2007. The adoption agency staff member stated that the parents had contacted the agency because they wished to give up the child for adoption. The social worker stated that this would not be possible because the child was in the custody of the Riverside County Juvenile Court. The staff member would not provide the social worker with any contact information for the parents, including whether they were at that

time living in Texas. The social worker asked the staff member to ask the parents to contact CPS as soon as possible. Father first contacted CPS the following day.

The parents at some point came back to California and began staying at a motel. The social worker noted that she had several meetings with the parents at the CPS office to discuss the case and its process with them. However, the parents were not interested in hearing about the case, and wanted only to express their opinions about the existence of a conspiracy between CPS, the hospital and the court to kidnap the child and put her up for adoption. Father was asked to drug test on September 18, 2007, but failed to do so.

The report stated that on October 31, 2007, the hospital social worker had informed CPS that the meconium test, to determine whether the child had been exposed to drugs before birth, could not be performed because the sample was too small. Thus, CPS had no direct evidence that the child was born with methamphetamine in her system.

The parents began to have weekly supervised visits with the child in late September or early October. During a visit on October 10, 2007, the parents claimed the child had a high fever and was not being properly cared for. The situation began to escalate, so the social worker's assistant terminated the visit. Mother refused to hand the child over and shoved the assistant's hands away as she reached for the child. Father eventually persuaded mother to give the child up. The parents left the building and called police. The police arrived and talked with the parents and examined the child. The police left after noting no health concerns other than a redness or rash in the child's eye area.

The public health nurse examined the child and found no fever. The foster mother then took the child to the pediatrician, who also noted no health concerns.

During a visit on November 1, 2007, the father brought a video camera. Upon being told that video and audio taping of visits was against CPS policy, father became very angry and told the assistant “You are being taped at this time.” The assistant insisted father put away the video camera. Father called 911, and only put the camera away after police intervened.

The social worker noted concerns regarding the parents’ mental stability, especially regarding mother, because of their consistently erratic behavior.

Continued Hearing on Motion for Reconsideration

The continued hearing on the parents’ motion for reconsideration was held on November 13, 2007. Mother and father were both present, in pro per. The juvenile court stated that it had reviewed the transcript of the October 1, 2007 hearing in Indio before the previous bench officer, and concluded that the previous bench officer had not set a new jurisdiction and disposition hearing. Rather, the court noted that “it is apparent that it is Judge Sheldon’s procedure to set matters for reconsideration and then set them for contested jurisdiction/disposition hearings if and only if he grants the motion for reconsideration.” The court then heard from the parties as to its authority to consider the motion. The court denied the motion because it did not believe it had authority to revisit the jurisdiction and disposition findings of the previous bench officer. The court then denied the rest of the various motions filed by the parents.

Section 388 Petition

On September 24, 2007, the parents prepared a JV-180, Request to Change Court Order pursuant to section 388. The petition asked the court to reverse its jurisdiction and disposition orders made on September 10, 2007. The petition was apparently received by the juvenile court on October 15, 2007, and subsequently filed on November 14, 2007. The court summarily denied the petition on November 14, 2007.⁶ This appeal followed.

DISCUSSION

The parents argue the juvenile court abused its discretion when it summarily denied the petition without a hearing because the petition established a prima facie case that new evidence required a modification of the jurisdiction and disposition orders and that the modification would be in the best interest of the child.

Section 388 provides “Any parent . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . to change, modify or set aside any order of court previously made” The petitioner must show by a “preponderance of the evidence” that: (1) there is new evidence or a change of circumstances; and (2) that the proposed modification based on the new evidence or change of circumstances would be in the child’s “best interests.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526-527, fn. 5.)

⁶ The minute order indicates the court denied the petition on November 14, 2007. However, the handwritten date next to the court’s signature denying the petition is “11-13-07.”

The petition must make a prima facie showing as to both elements, change of circumstance and promotion of the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) A hearing must be held if the petition states a prima facie case, which has been analogized to a showing of probable cause. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) “The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]” (*Zachary G.*, at p. 806; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 673.) The petition should be liberally construed. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) More than general conclusory allegations are required to make this showing, even when the petition is liberally construed. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) If the petition fails to state sufficient change of circumstances or new evidence or facts showing it would be in the best interests of the child to modify the order, the petition may be denied without a hearing. (California Rules of Court, rule 5.570(d); *Zachary G.*, at p. 808.) The juvenile court may rely on its own knowledge of the facts of the case to summarily deny a section 388 petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.)

Here, the request to change court order filed on November 14, 2007 asked the court to change the jurisdiction and disposition orders entered on September 10, 2007. On the portion of the petition asking what had changed after the challenged order that would change the judge’s mind, the petition states “There is no confirmed drug use or history of abuse, no documented drug exposure to newborn [A.W.], negative meconium,

factual NON-drug history, prenatal care as evidenced with TWO ultrasounds and multiple gynecologist visits - all with negative urine testing [Ex. C], and CPS had reasonable methods to contact us for due process but failed to do so. The mother and fetus were one identity until birth, no drugs.” To summarize, the petition asserted there was new evidence that: 1) mother did not abuse drugs; 2) [A.W.] was not exposed to drugs; and 3) mother had obtained sufficient prenatal care. We conclude that the evidence presented with the petition did not establish a prima facie case that the court’s jurisdiction and disposition orders should be modified.⁷

First, mother’s evidence that she did not abuse drugs consisted of her own statements in attachments to the petition, plus the medical notes from an initial obstetrical exam that took place on June 27, 2007. The medical notes do not address mother’s history or non-history of drug use, other than to mention that “Patient denies illegal drug use.” At oral argument, mother’s counsel urged that the juvenile court also had before it, attached to the parents’ motion for reconsideration filed September 28, 2007, a copy of a

⁷ To be clear, the evidence attached to the petition is as follows: 1) a document created by the parents entitled “JV 180 Request to Change Court Order,” which expands upon the information in the petition; 2) three separate documents created by the parents entitled “Parental Visitation Documentation Form,” which are discussed below; 3) an unsigned document created by the parents dated September 7, 2007, and entitled “[C.W.]’s Statement and Requests of the Court for 9.10.07” and a similar document entitled “[G.W.]’s Statement and Requests of the Court for 9/10/07;” 3) a document purporting to be a copy of an e-mail sent on August 10, 2007, by the parents to “all attorneys in the Riverside County Area” which relates the parents’ version of CPS’s actions in detaining the child at the hospital; 4) two documents, discussed below, indicating that mother had sought dental treatment on July 23, 2007, and had an initial obstetrical examination on June 29, 2007; 5) and a listing of “Patient Information for [C.W.]” dated July 3, 2007.

negative drug test that mother underwent in May 2007 as a condition of employment. Assuming this evidence was properly before the juvenile court when it summarily denied the section 388 petition, a single negative drug test dated May 9, 2007, does not establish a prima facie case that mother was not under the influence of drugs three months later, in August 2007. Second, mother states in the petition that the meconium test was negative for drugs, which is not accurate. In reality, the sample taken was too small to test. While we recognize that CPS had no evidence that the child was born exposed to drugs, this evidence is not new, as the juvenile court had before it at the time of the jurisdictional finding the results of the child's negative urine test. More important, assuming mother could conclusively establish that the child was not born exposed to drugs, this was never a basis for the jurisdiction finding. Although the detention report stated that the results of the meconium test were still outstanding, the jurisdiction report does not state or even imply that the child might eventually test positive for drugs. Third, mother's evidence that she had received medical care consisted of: (a) a medical consult form dated July 23, 2007, indicating that mother had sought a dental treatment and was pregnant; and (b) the notes on the initial obstetrical examination that took place on June 29, 2007. These two items are consistent with the evidence presented at the jurisdiction hearing that mother had admitted to having had only two pre-natal appointments during her pregnancy. Thus, this lack of a prima facie showing of new evidence is enough to support the juvenile court's order denying the petition.

We further conclude that the petition did not establish a prima facie case that reversing the jurisdiction order and returning the child to the parents' custody would be in her best interest. The parents' argument on this issue, as set forth in the petition, is that "We are her loving, caring, biological, rightful parents and have our home since 2001 in Austin, Texas. When we visited [A.W.] on 9-20-07, she had severe blisters on her lips and severe diaper rash, indicating abuse/neglect in her current care. We do not use drugs or alcohol of any kind in any way. The caseworkers have caused child abuse to our newborn with their overzealous kidnapping without cause." The parents attach three documents created and signed by them, each entitled "parent visitation documentation form." In these documents, the parents complain about the visits with the child on September 20, October 2, and October 10 and state that the child arrived at visits with diaper rash, blisters on her lips, a rip behind her left ear, and that "CPS workers are smothering her with a blanket in a moving car." This evidence, if given credence by the juvenile court, would not make a prima facie case that the jurisdiction order should be reversed and the child should be returned to her parents. Rather, the evidence addresses the quality of the foster home, which is a different issue from whether it would be in the child's best interest to return to her parents.

To conclude, then, the juvenile court did not abuse its discretion when it summarily denied the parents' section 388 petition for modification.

DISPOSITION

The court's orders are affirmed.

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RAMIREZ
P.J.

We concur:

GAUT
J.

MILLER
J.